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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-315

BONN BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. -

BONN BROWN,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Bonn Brown respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 18, 1973.

OPINION BELOW

No opinion was rendered by either the Court of Appeals or the District Court for the Western District of Virginia.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 18, 1973. This petition for certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 22(2).

QUESTIONS PRESENTED

1. Whether an indictment, with nothing more, is admissable as evidence of a prior similar act.
2. Whether an indictment and conviction, then on appeal, are properly admissable as impeachment evidence on the issue of credibility.
3. Whether the admission of the acquittal of one alleged co-conspirator should be admitted in the trial of another alleged co-conspirator; especially where a third alleged co-conspirator is a witness for the government and testifies to his plea of guilty, conviction and sentence.

STATEMENT OF THE CASE

A. The Proceedings Below

In March, 1971, the petitioner was indicted in the United States District Court for the Southern District of West Virginia for conspiracy to obstruct justice and to bribe a public official in violation of 18 U.S.C. §§371, 201(b) and (c) and §1503; of bribing a public official in violation of 18 U.S.C. §201(b); and of obstructing justice in violation of 18 U.S.C. §1503 for acts allegedly committed in August, 1968. The matter was transferred to the United States District Court for the Western District of Virginia in Charlottesville and trial before the Honorable Walter E. Hoffman, Chief Judge of the United

States District Court for the Eastern District of Virginia, was held from September 18, 1972, through September 25, 1972, at the conclusion of which a jury found Mr. Brown guilty on all counts. A Motion for Judgment of Acquittal and/or a New Trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure was timely filed, and heard and denied by Judge Hoffman sitting, with consent of all parties, in the United States District Court for the Eastern District of Virginia at Norfolk, Virginia on February 2, 1973. After denying appellant's motions, Mr. Brown was sentenced under the provisions of 18 U.S.C. 4208(a)(2) to five years on each of the three counts of the indictment, said sentences to run concurrently, and a $10,000.00 fine apportioned, $5,000.00 to count 1 of the indictment and $5,000.00 to count 2 of the indictment. Timely Notice of Appeal was filed and after briefs and argument, the United States Court of Appeals for the Fourth Circuit affirmed appellant's conviction on July 18, 1973.

B. Statement of Facts

In 1968, the petitioner, together with William Wallace Barron, Burl A. Sawyers, Vincent J. Johnkowski, Alfred W. Schroath and Truman E. Gore,[1] was indicted for conspiring to violate 18 U.S.C. §1952. He was alleged to have used interstate facilities to commit bribery in violation of W. Va. Code Chapter 61, Article 5 § § 4 and 5. (Tr. 8). Following a trial before the Honorable J. Robert Martin, Jr., and a jury, the petitioner was found

[1] Gore was severed due to the illness of his attorney and has not yet been tried.

guilty as charged. The remaining defendants, with the exception of William W. Barron, were also found guilty. (Tr. 339).

The foreman of the 1968 jury was one Ralph E. Buckalew (Tr. 223). According to the government's evidence, Buckalew received a bribe in the amount of $25,000.00 through his wife, Alice Buckalew, for which Buckalew, according to his testimony, agreed to use his efforts as a juror to obtain an acquittal for, Barron or, if acquittal was impossible, to hang the jury as to Barron. (Tr. 223-224, 249, 253). On the second day of deliberations, the jury found all the defendants guilty with the exception of Barron (Tr. 349). As to Barron, the jury voted 11-1 for conviction, Buckalew the lone dissenter. Within several hours, Buckalew, however, persuaded the jury to vote unanimously for Barron's acquittal. (Tr. 353-354).

The government offered evidence to show that a portion of the bribe paid to Bucklalew came from the petitioner, Bonn Brown, for the purpose of securing Buckalew's efforts to obtain Brown's acquittal. The principal government witness against the defendant Bonn Brown was Barron, who, prior to Brown's trial, pleaded guilty to the indictment and received a sentence of twelve years imprisonment. (Tr. 130-131).

Barron and Brown had been professional and social friends since 1936. In 1963, during Barron's term as governor, Brown himself sought to secure the democratic nomination for governor of West Virginia. He attempted to enlist the aid and support of Barron. Barron, however, refused to support Brown, and, instead, supported Brown's opponent. (Tr. 137-139, 656, 657).

In July 1968, a few weeks prior to trial, Ralph E. Buckalew approached Mrs. Barron at a bingo game and indicated that he would like to speak to Barron. A short

time thereafter, Buckalew went to Barron's apartment and, according to Buckalew's testimony, informed Barron by means of a note, that he was called for jury duty at the same time that Barron was scheduled to go to trial. (Tr. 230-231).

The trial commenced on August 12, 1968, in the United States District Court for the Southern District of West Virginia. Barron was represented by Robert G. Perry, Esquire. Toward the end of the first week of trial, Perry, so Barron testified, advised Barron that he (Perry) had contacted Buckalew, who was serving as foreman of the jury. (Tr. 98-101).[2]

According to the government's evidence, during the course of the trial, Mrs. Barron and Mrs. Buckalew met by prearrangement, on several occasions. (Tr. 101-102; 105-107). The negotiations concluded a few days before the case was submitted to the jury for deliberations. The agreement reached, according to Mr. Buckalew, was that he was to receive $25,000.00 from Barron in exchange for his efforts to secure Barron's acquittal or, if an acquittal was impossible, to hang the jury as to Barron. According to Buckalew, the money paid by Mrs. Barron to him through his wife was solely to secure Barron's acquittal. (Tr. 236, 242-243, 249, 262).

Barron testified that once the $25,000.00 bribe was agreed upon, he borrowed $10,000.00 from a friend, and was offered the balance by his attorney, Robert G. Perry (Tr. 107-108).[3] On August 26, 1968, two days after

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[2]The jury was sequestered at the Daniel Boone Hotel (Tr. 100).

[3]On the examination by the Government and over the objection of defense Counsel, Barron testified that he pleaded guilty to the offenses charged in the indictment and was sentenced to a term of twelve years (Tr. 129-131).

Barron borrowed the above $10,000.00, Brown approached Barron, so Barron testified, and indicated to Barron that he was aware that Buckalew had been contacted. According to Barron, Brown requested that Buckalew work on his behalf, also. Barron testified that Brown informed him that he (Brown) could get $10,000.00 through one Julius George, which, Brown offered to contribute toward the $25,000.00 bribe. (Tr. 117-118). Barron testified that, on the following day, he discussed the matter with Perry and Perry recommended that Brown be included (Tr. 122). Again, according to Barron, Perry delivered $25,000.00 in cash to Barron later the same day. Of the $25,000.00, approximately $9,000.00 or $10,000.00 was bound in wrappers from the National Bank of Commerce, Charleston, West Virginia, dated August 27, 1968 (Tr. 119-121).[4] On the same day, Mrs. Barron delivered the $25,000.00 to Mrs. Buckalew (Tr. 121).

For the purpose of showing a prior similar act, the Government toward the end of its case in chief introduced and read portions of the 1968 indictment (App. 1b).

After introducing part of the defendant's grand jury testimony, the Government rested.

The defense relied upon the testimony of Alice Buckalew, Dr. Benjamin I. Golden, Austin Doyle, Beulah Nine, Robert G. Perry and Bonn Brown. Brown testified on his own behalf. He denied contributing $10,000.00 for the $25,000.00 bribe for Buckalew (Tr. 697-699).

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[4] According to Bette Shorr, a teller employed by the National Bank of Commerce, she delivered to Julius George on August 27, 1968, $9,960.00 in cash bound in wrappers bearing the bank's name (Tr. 49-50, 52). And according to Julius George, he borrowed the above sum to loan to Brown (Tr. 58-61).

After relating his background and his professional and social relationship with Barron, Brown testified to the events immediately preceeding the 1968 trial. The indictment was returned February 14, 1968. Two weeks later, Brown sought to retain Edward Bennett Williams. The Williams' firm was retained in March of 1968 at an agreed fee of $50,000.00 plus expenses. (Tr. 658-660).

One of Brown's co-defendants, Alfred W. Schroath, had retained the firm of Steptoe & Johnson. Brown testified that he and Schroath entered into an arrangement whereby their total legal fees would be split 50-50. Steptoe & Johnson was to defend Schroath for $15,000.00. (Tr. 661-662).

Brown testified that he arrived in Charleston a few days before trial unable to meet immediate expenses. He stated that almost immediately upon his arrival, he asked to borrow between $7,500.00 and $10,000.00 from Julius George, a close friend, to cover the expenses of trial. (Tr. 663-665). Julius George corroborated this testimony. (Tr. 74-76). On August 27, 1968, Julius George did receive $9,960.00 in cash from the National Bank of Commerce, and did subsequently turn most of that money over to Brown. Julius George could not recall whether the money was given to Brown on August 27th or a few days thereafter (Tr. 61-62).

Brown testified that after receiving the money from George on August 29, 1968, he kept most of the money with him until his return to Elkins following the trial. Brown gave the money to his secretary who in turn locked it in a safe place in his office where it remained until September 13, 1968. (Tr. 586-587, 599-600, 667-668). On that day, Brown met with Schroath and was advised by Schroath that Schroath was going to Washington. Brown gave Schroath what was left of the loan, $7,500.00, to deliver to Williams' office. Schroath

represented that he would deliver a similar amount on his own behalf. (Tr. 668-670). According to the accounting records of Williams' law firm, the following payments were made by Brown: (1) May 1968 – $2,500.00 check; (2) July 1968 – $2,500.00 check; (3) August 1968 – $7,500.00 check; (4) January 1969 – $2,500.00 check (Tr. 370-371).

One of the principal defense witnesses was Robert G. Perry, Esquire, who represented Barron at the 1968 trial. Perry testified that while he and Barron discussed all the prospective jurors, he could not recall a specific conversation concerning Buckalew (Tr. 638, 639-640). Perry said he never met or talked to Mrs. Buckalew until a few minutes prior to his testifying, and he further stated that he never met or talked to Mr. Buckalew. (Tr. 644). He also testified that he never had a conversation of any nature with Barron or Brown in reference to the bribing of a juror during the 1968 trial (Tr. 647)[5]

Government called as a rebuttal witness Michael C. Paterno, an accountant and custodian of the records of Alfred Schroath who was deceased at the time of trial. Paterno testified that the records of Schroath's estate reflected that on April 18, 1969, an entry notes a deposit of $5,000.00 marked "loan, Bonn Brown," and in that same month, a check of $25,000.00, payable to Edward Williams, was carried as $12,500.00 – legal and professional and $12,500.00 – "Bonn Brown, loan" (Tr. 805-807).

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[5]Perry was charged as a co-defendant and alleged to be a co-conspirator. At the time he testified on Brown's behalf, he had been tried on the charges in the indictment and acquitted. The Court ruled, however, that Perry's acquittal was not admissible (Tr. 18-19, 311-316).

REASONS FOR GRANTING THE WRIT

I.

THE 1968 INDICTMENT WAS NOT PROPERLY ADMISSABLE AS EVIDENCE OF A PRIOR SIMILAR ACT; AND ITS ADMISSION DENIED PETITIONER A FAIR TRIAL.

The Government, over objection, was permitted to read portions of the 1968 indictment to the jury (App. 1b). This was admitted as evidence of a prior similar act to prove the defendant's knowledge, motive and intent. (Tr. 446, 449).

The 1968 indictment, however, does not qualify as evidence of a prior similar act. It is true, as the Court of Appeals for the Fourth Circuit said in *United States v. Chase*, 372 F.2d 453, 460 (4th Cir. 1967), quoting *Kowalchuck v. United States*, 176 F.2d 873 (6th Cir. 1949):

> Where intent and knowledge are essential elements of the crime for which a defendant is being tried, evidence of other transactions, even though criminal in motive, is admissable if the transactions are so connected with the offense charged that they serve to show a general pattern and to prove the necessary criminal intent or guilty knowledge.

See also *United States v. Mastrototaro*, 455 F.2d 802 (4th Cir. 1972).

If evidence of the incident or circumstances which led to the 1968 indictment was admissible against petitioner as evidence of a prior similar act, it was admissible only in the form of evidence of the act itself, and not the pleading or accusation upon which Brown was brought to trial. See e.g., *United States v. Mastrototaro*, 455 F.2d 802 (4th Cir. 1972) (testimony); *United States v. Chase*,

372 F.2d 453 (4th Cir. 1967) (acts and declarations); *United States v. Dutsch*, 357 F.2d 331 (4th Cir. 1966) (testimony).

In addition, the burden is on the party introducing such evidence to establish that the prior similar act is similar enough to the current charge to have sufficient probative value to qualify its admissibility. *United States v. Mastrototaro*, *supra*. There was no evidence—not even a proffer—to show how, if at all, the incident or circumstances underlying the 1968 indictment were similar to the present charge. In short, the Government never laid the necessary predicate to qualify the 1968 indictment or the circumstances underlying the indictment as relevant or admissible evidence on the issue for which it was admitted and on which the jury was instructed.

In any event, the reason evidence of prior similar acts is admissible to prove criminal intent is as Professor Wigmore explains (2 Wigmore, EVIDENCE, §302 p. 196 (3rd ed. 1940)):

> The argument here is purely from the point of view of the doctrine of chances—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all.

Here, other than putting the Government to its proof, Brown never disputed the issue of criminal intent. According to the Government's evidence, Brown gave Barron $10,000.00 as a contribution toward a $25,000.00 bribe paid to Buckalew. There was nothing ambiguous about Barron's testimony on this score. See *United States v. Dutsch*, 357 F.2d 331 (4th Cir. 1966). On the other hand, Brown denied ever giving Barron the $10,000.00. In short, Brown did not acknowledge a $10,000.00 payment to Barron for something other than a bribe.

Here, the intent of the defendant was not put in issue; either the jury believed that Brown gave Barron $10,000.00 to bribe Buckalew or that Brown gave Barron nothing.

Nor can the fact that it was the defense who first introduced evidence of the conviction be used to nullify the prejudice of the prosecutor's act in bringing to the attention of the jury the substantive crime upon which Brown was convicted in the 1968 case.[6] Brown was on trial for allegedly bribing a juror. No single piece of evidence could have been more prejudicial to his defense than for the jury to learn that the 1968 case involved a charge of bribery. While it was necessary for petitioner to bring out that he was convicted in the 1968 trial in an attempt to demonstrate his innocence of partaking in the scheme to bribe the jury foreman, trial defense counsel carefully did not go beyond the fact of conviction. (Tr. 201).

The indictment; and, hence, bringing to the attention of the jury that the substance of the 1968 charge was "bribery" served no legitimate prosecutorial purpose and denied to petitioner a fair trial.

II.

THE INDICTMENT AND CONVICTION WERE NOT ADMISSABLE AS EVIDENCE BEARING ON PETITIONER'S CREDIBILITY.

Following the introduction of a portion of the 1968 indictment into evidence by the Government and again at the close of the case the Court instructed the jury that, in

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[6] On cross examination of Barron, defense counsel elicited that in the 1968 case petitioner had been convicted of the one count in the indictment (Tr. 201).

addition to considering the indictment as proof of a prior similar act, it could consider it as bearing on petitioner's credibility. (Tr. 450, 860-861).

We do not think the 1968 indictment or conviction was admissible to impeach Brown's credibility. First, we note that the 1968 indictment and conviction were admitted in the Government's case, and thus, were before the jury before Brown testified. Brown therefore never had the choice of not testifying in order to preclude the Government from putting the 1968 indictment and conviction before the jury. Second, even if Brown's 1968 *conviction* was admissible for some purposes–i.e., to show that Buckalew did not secure an acquittal for Brown–it was not necessary that the jury be informed of the specific charge which was the subject of the 1968 trial. We mention this because we do not think it can be argued that petitioner waived his objection to the admissibility of the 1968 indictment and the conviction as defined by the indictment when he relied on the conviction as a defense to the present charge or when he took the stand and testified on his own behalf.

Brown's 1968 conviction was not final at the time of the present trial. The four defendants, the petitioner among them, who were convicted in the 1968 trial appealed their convictions to the Court of Appeals for the Fourth Circuit. The convictions were affirmed on March 23, 1970. *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970).

After the convictions were affirmed, a petition for rehearing was filed, based on cases pending in the West Virginia Supreme Court of Appeals in which the West Virginia bribery statutes, W.Va. Code, Ch. 61, Art. 5, Secs. 4 & 5 were being challenged. The Fourth Circuit on May 1, 1970, remanded the case to the District Court with directions to stay the convictions until the West

Virginia Supreme Court determined the constitutionality of the West Virginia bribery statutes.

On July 17, 1970, the Supreme Court of Appeals of West Virginia rendered its decisions in the cases which had been the basis for the remand order. *State ex rel. Carson v. Wood*, 175 S.E. 2d 482 (W.Va. 1970); *State ex rel. Gillespie v. Wood*, 175 S.E.2d 497 (W.Va. 1970). Those decisions upheld the constitutionality of the bribery statutes, although limiting their application.

Following those decisions, the defendants moved the District Court to vacate their convictions. Their motions were heard and were overruled by Judge Martin. That ruling was appealed and that appeal was pending when, on February 20, 1971, an indictment was returned in the Southern District of West Virginia charging Barron, his wife, and the jury foreman in the 1968 trial, Ralph E. Buckalew, with crimes relating to jury bribery in the 1968 trial. As a result of that indictment, the appellants in *United States v. Sawyers*, No. 12,872, moved the Fourth Circuit for another remand to the District Court for consideration of motions based upon the jury tampering. On March 19, 1971, the Fourth Circuit again remanded the case to the District Court.

Since the remand of March 19, 1971, the convicted defendants in the 1968 case, Sawyers, Johnkoski and petitioner,[7] have filed motions to vacate their convictions, or in the alternative to be granted a new trial. Those motions are pending before Judge Martin.

With some limitations an accused who testifies may ordinarily be impeached with prior convictions. There is a split of authority, however, as to whether a conviction which is then on appeal may be used for impeachment

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[7]By this time, the fourth convicted defendant, Alfred W. Schroath, had died.

purposes. Most of the circuits as well as the States that have considered the question have concluded that such a conviction is admissible.[8] The Court of Appeals for the District of Columbia Circuit holds to the contrary. We think this is the better view for the reasons expressed by the Court in *Fenwich v. United States*, 252 F.2d 124, 126 (D.C. Cir. 1958) quoting from *Campbell v. United States*, 176 F.2d 45, 47 (D.C. Cir. 1949):

> [I]t seems wholly illogical and unfair to permit a defendant to be interrogated about a previous conviction from which an appeal is pending. If the judgment of conviction is later reversed, the defendant has suffered, unjustly and irreparably, the prejudice, if any, caused by the disclosure of the former conviction. *We therefore hold that the pendency of an appeal prevents the prosecution from proving a previous conviction for impeachment purposes*; and that the District Court erred in admitting evidence concerning Campbell's conviction when his appeal therefrom had not been determined. [Emphasis Supplied.]

Even if Brown's 1968 conviction was otherwise qualified as admissible evidence, under the circumstances of this case it should have been excluded. Grave concern has been expressed where—as was the case here—the prior conviction comes dangerously close to the substance of the crime for which the accused is standing trial. In *United States v. Hildreth*, 387 F.2d 328, 329 (4th Cir. 1967), the Court wrote:

> Prior criminal convictions for felonies or misdemeanors involving moral turpitude ordinarily constitute material impeaching evidence. McCormick on

[8] For a discussion of the various jurisdictions and their positions see 16 ALR 3d 723.

> Evidence, §43 p. 90. There are times, of course, when the Court may impose limits on the cross-examination of a witness, especially a defendant, when there is reason to apprehend that the prejudicial effect of the earlier convictions sought to be adduced will outweigh their possible probative force in impeaching credibility. This may be the case, for example, when the prior conviction is remote in time, *too near the substance of the alleged crime for which the defendant is currently being tried*, or involved no element of mandacity or deceitfulness. [Emphasis Supplied].

At the very least, therefore, we think this was a case in which the prejudicial impact of relating the nature and substance of petitioner's 1968 conviction to the jury far outweighed its probative value. If the jury had to be informed that Brown suffered a 1968 conviction, it should not have been informed of the exact nature and substance of the charge. To have done so unnecessarily prejudiced his opportunity to defend the present charge free of inflammatory and extremely prejudicial matter.

III.

UNDER THE CIRCUMSTANCES OF THIS CASE EVIDENCE OF PERRY'S PRIOR ACQUITTAL SHOULD HAVE BEEN ADMITTED.

Barron's attorney during the 1968 trial was one Robert G. Perry, Esq. Perry was indicted as one of Brown's co-conspirators. According to the Government's evidence as related through the testimony of Barron, Perry was instrumental in raising $15,000.00 toward the $25,000.00 bribe given Buckalew. Prior to Brown's trial, Perry had been tried and acquitted of the above charge. On the other hand, Barron had entered a plea and had been sentenced to a term of twelve years. While Barron's

plea and sentence were admitted as evidence, Perry's acquittal was held inadmissible. We submit this was error and denied petitioner a fair trial. *Jackson v. State*, 26 S.W. 194, (Tex. Cr. R. 1894).

In *Commonwealth v. Quaranta*, 295 Pa. 264, 145 A. 89, 92 (Sup.Ct.Pa. 1928), the Supreme Court of Pennsylvania wrote:

> The Commonwealth's evidence tended to show that the witnesses were accomplices. Standing alone, this fact clearly revealed an intense interest by them in the result of the trial of the defendant. Without explanation, their complicity could be kept prominently before the jury throughout the trial, imparring, if not destroying, the value of their testimony. "It bears against a witness' credibility that he is an accomplice in the crime charged. * * * When the co-indictee testifies for the accused, his situation here may also be considered as tempting him to exonerate the other accused and thus help toward his own freedom." 2 Wigmore on Evidence, §967. The fact of acquittal could be used to show want of personal interest. It was a very material circumstance in defendant's case. "If the credibility of a witness is attached by evidence that he has been charged with the commission of a crime, he may in rebuttal prove that he has been acquitted of that charge." 28 R.C.L. 649 §233; Jackson v. State, 33 Tex. Cr.R. 281, 26 S.W. 194, 622, 47 Am. St. Rep. 30. The use of the evidence should be carefully limited to this purpose by the trial judge, and its connection with the case explained to the jury.

The manner in which the Government's case was presented made the fact of Perry's trial and acquittal particularly significant. As the jury had been informed or as could be inferred from the evidence, Barron implicated Perry and Brown in the bribery scheme in exchange for

the Government's promise not to prosecute Barron's wife. The jury was entitled to know the extent, nature, and ultimate result of Barron's agreement with the Government as it related to Perry, for Perry was not only an important defense witness but he was also part of the bargain, as was Brown, in freeing Barron's wife. In addition, the Government argued to the jury not to believe Perry ". . . in light of his situation." (A. Tr. 16).[9] No attempt was made to explain what "situation," leaving the clear implication that Perry was facing prosecution and would, therefore, have a motive to lie. This was not only misleading, but highly prejudicial to petitioner.

Furthermore, Perry's acquittal was certainly admissible to show lack of bias or prejudice on his part. *Commonwealth v. Quaranta, supra*. This was particularly true since the jury was informed of the status and outcome of the charge against Barron. In short, during the Government's examination of Barron, the jury was permitted to know that the charge against Barron had been disposed of, and he was thus testifying free of any motive to obtain a favorable disposition of a pending charge or a recommendation for a light sentence. On the other hand, during the defendant's examination of Perry, the jury was not permitted to know that Perry, too, was testifying free of any motive to obtain a favorable result of a pending charge. In view of the above, we believe it was error to preclude the defendant from putting Perry's acquittal before the jury.

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[9] Closing arguments of counsel were separately transcribed and numbered, and are, therefore, designated "A.Tr."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1315

United States of America,

Appellee,

versus

Bonn Brown,

Appellant.

Appeal from the United States District Court
for the Western District of Virginia,
at Charlottesville.

On instruction from the Court and after its consideration of the record and briefs, and after hearing the argument at bar of counsel, judgment is hereby entered, under Rule 36 of the Federal Rules of Appellate Procedure, affirming the order on appeal in this case.

/s/ William K. Slate, II
CLERK

FILED
JUL 18 1973
William K. Slate, II
Clerk

APPENDIX B

[Tr. 447-448] "United States District Court for the Southern District of West Virginia, February, 1968 Session, Charleston, United States of America versus William Wallace Barron, Burl A. Sawyers, Vincent J. Johnkoski, Truman E. Gore, Bonn Brown and Alfred W. Schroath, No. 685," and sections of the United States Code.

"The grand jury charges:

"1. From on or about January 16, 1961, and continuously thereafter up to and including the date of this indictment, in the Southern District of West Virginia, and elsewhere, the defendants herein: William Wallace Barron; Burl A. Sawyers; Vincent J. Johnkoski; Truman E. Gore; Bonn Brown; and Alfred W. Schroath did knowingly and wilfully combine, conspire, confederate and agree with each other, and with divers persons whose names are unknown to the grand jury, to commit certain offenses against the United States in violation of Section 1952 of Title 18, United States Code, in that they would travel in interstate commerce, and that they would use and wilfully cause others to use facilities in interstate commerce, including telephones and the mails, all with the intent to distribute the proceeds, promote, manage, establish, and carry on and facilitate the distribution of the proceeds, promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being bribery in violation of Section 4 and 5, Article 5, Chapter 61 of the Code of West Virginia; and that the defendants would thereafter perform and wilfully cause others to perform acts promoting, managing, establishing, carrying on and distributing the proceeds of said unlawfully activity and acts facilitating the promotion, management, establishment, carrying on and distribution of the proceeds of said unlawful activity.

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BONN BROWN, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-315

BONN BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by either the district court or the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1973. The petition for a writ of certiorari was filed on August 17, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission into evidence in petitioner's 1972 trial for bribery of his 1968 indictment and conviction for bribery constituted prejudicial error.

2. Whether the prior acquittal of an alleged co-conspirator on the later jury bribery charges was properly excluded from evidence.

STATEMENT

After a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted on three counts of obstruction of justice and bribery of a public official (a juror) in violation of 18 U.S.C. 2, 201(b), 371, and 1503. He was sentenced to five years' imprisonment on each of the three counts, the terms to run concurrently. He was fined $5,000 on each of the first two counts. The court of appeals summarily affirmed (Pet. App. A).

A. *The 1968 Government Contract Bribery Case and its Aftermath*

In 1968, petitioner, together with former governor of West Virginia W. Wallace Barron, Burl Sawyers, Vincent Johnkoski, Alfred Schroath, and Truman Gore, was indicted in the Southern District of West Virginia for conspiracy to violate 18 U.S.C. 371 and 1952. Petitioner was charged with having used interstate facilities to commit bribery involving kickbacks in the award of contracts with the State of West Virginia, in violation of the West Virginia bribery statutes, specifically West Virginia Code, c. 61, Art. 5, Sections 4 and 5 (Tr. 8).[1] After a jury trial, petitioner and three defendants were found guilty as charged. Ex-Governor Barron was acquitted (Tr. 339). Petitioner was sentenced to a four-year term of imprisonment and fined $10,000. The court of appeals affirmed. *United States* v. *Sawyers,* 423 F. 2d 1335 (C.A. 4).

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[1] "Tr." designates the transcript of the 1972 trial, a copy of which is being lodged with the Clerk of this Court. The closing arguments are bound and paginated separately, and are therefore cited as "C.A."

On February 20, 1971, an indictment was returned in the Southern District of West Virginia charging ex-Governor Barron, his wife Opal Barron, and Ralph Buckalew, the jury foreman in the 1968 trial, with bribery of a juror during the course of the 1968 trial. By superseding indictment petitioner and one Robert Perry were also named in this charge. As a result of that indictment, petitioner and other defendants requested the court of appeals to remand the 1968 case to the district court again for consideration of motions based upon the allegations of jury tampering[2]. On March 19, 1971, the court of appeals again remanded the case to the district court. Petitioner and the other defendants then filed motions to vacate their convictions, or in the alternative for a new trial. On August 30, 1973, subsequent to the court of appeals' decision in the 1971 jury bribery case involved here (Pet. App. A), the district court heard the defendants' motions but, on the suggestion of petitioner's counsel, has deferred ruling on petitioner's motion pending the Court's action on the present petition for a writ of certiorari.[3]

B. *Trial of the Jury Bribery Case*

The trial of petitioner for bribery of jury foreman Ralph Buckalew during the 1968 trial took place in September

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[2]The court of appeals had previously remanded the case to the district court for possible further proceedings based on the outcome of a then-pending state court challenge to the constitutionality of the state bribery statute. Motions for a new trial were denied after the state supreme court upheld the constitutionality of the bribery statutes, *State ex rel. Carson* v. *Wood,* 175 S.E. 2d 482 (W. Va.); *State ex rel. Gillespie* v. *Wood,* 175 S.E. 2d 497 (W. Va.), and petitioner and other defendants again appealed.

[3]Although no orders have yet been entered, the district judge has said he will grant new trials to two other defendants.

1972.[4] Ex-Governor Barron testified that he had arranged with his attorney, Robert Perry, a codefendant who had previously been acquitted on this charge, to have a $25,000 bribe given to juror Buckalew in return for a verdict of acquittal, or at the very least a hung jury, in the 1968 case (Tr. 100-107). Barron was able to raise $15,000 through Perry (Tr. 107-108). He raised the balance through the Citizens National Bank in Weirton, West Virginia, on August 22, 1968, through a loan that was not to be reflected on the books of that bank (Tr. 108).

Barron stated that on August 26, 1968, he first had a discussion with petitioner concerning the jury bribe (Tr. 116-118). At that time, Barron testified, petitioner told Barron that he knew "Buckalew had been reached and that he wanted to be a part of that transaction and he was willing to put $10,000 into that transaction" (Tr. 118, 200). Petitioner advised Barron that his source for the $10,000 was one Julius George, who had a cashier's check for $10,000, and that

> Mr. Julius George could get this cashier's check cashed and nobody would be able to find out about it, and he would give this money to Mr. Brown who, in turn, would put it in and make it a part of the twenty-five thousand [Tr.118].

Barron and petitioner also discussed whether or not the payment of the $25,000 bribe would result in an acquittal or a hung jury (Tr. 119). At that time Barron told petitioner that the most they could expect would be a hung jury (Tr. 119).

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[4]On February 20, 1971, the day the first indictment was returned, Buckalew pleaded guilty and was immediately sentenced to terms of imprisonment for five and twelve years, the terms to run concurrently. On March 29, 1971, W. Wallace Barron pleaded guilty to the charges made against him for jury bribery; he was subsequently sentenced to a term of imprisonment for twelve years and a fine of $50,000.

On August 27, 1968, Julius George testified that he borrowed $9,960, by cashier's check, from the National Bank of Commerce in Charleston, West Virginia (Tr. 48-49, 60-61). After the check was cashed, the money was wrapped in groups of $1,000 and bound with paper straps containing a National Bank of Commerce stamp, the bank where the check had been negotiated (Tr. 52).

George testified that this loan was made at the request of petitioner, who wanted George to loan him "[s]omewhere in the neighborhood of $10,000" (Tr. 58-59). George, who was the manager of the Daniel Boone Hotel in Charleston, West Virginia, further stated that petitioner said he needed the money to pay his hotel bill at the Daniel Boone, where he stayed during the 1968 trial, for attorney's fees, and for "[g]eneral expenses that he was incurring during this time that he was spending—that he was spending in Charleston" (Tr. 58-59). George stated that, although he could not recall the exact amount of his loan to petitioner, it was between $9,000 and $10,000 (Tr. 60; see also Tr. 667). While he could not remember the exact day of delivery of the money to petitioner, George stated that it could have been given to him the same day it was borrowed from the bank (Tr. 61-62).

On the evening of August 27, 1968, Barron testified, Perry delivered $25,000 in cash to Barron (Tr. 119-120). The money was subsequently delivered to the jury foreman (Tr. 121-122, 223). Upon receiving the cash from Perry, Barron noticed that part of it was wrapped with paper wrappers and part with rubber bands (Tr. 120). Barron stated that approximately $9,000 or $10,000 was wrapped "like if you went to the bank to get a big check cashed and they would give you the cash. It had the wrappers of the bank around the money" (Tr. 120). These wrappers had "National Bank of Commerce, Charleston, West Virginia" on them ard were stamped August 27, 1968 (Tr. 120-121).

Barron testified that he talked with attorney Perry on the morning of August 27, 1968, concerning petitioner's knowledge of the bribery scheme (Tr. 122). Barron stated that Perry told him that petitioner had also contacted Perry (Tr. 122). According to Barron, Perry then advised Barron

> that it was all right with him to have him [petitioner] in on the transaction. As a matter of fact, it was better to have him on the transaction, since he was aware of the fact that Mr. Buckalew had been reached [Tr. 122].

On the morning of August 28, 1968, petitioner was told by Barron that the money had been delivered to juror Buckalew as planned (Tr. 124). Buckalew testified, however, he was never told that he was to work for the acquittal of anyone other than Barron (Tr. 238, 249, 261-262).

At the close of the 1968 bribery trial petitioner and three defendants were found guilty by the jury; Barron was acquitted. Previous to Barron's acquittal the jury vote was 11-1 for conviction with Buckalew as the lone holdout (Tr. 348-349).

Petitioner testified on his own behalf that Barron's testimony involving him in the bribery was a fabrication (Tr. 697-699). Petitioner claimed he used the cash received from Julius George in a legitimate manner (Tr. 665-671). Among his witnesses was Robert Perry, who testified that he had not participated in a bribery scheme, and that he had no knowledge of any involvement therein by petitioner (Tr. 644-647).

ARGUMENT

1. Petitioner contends that his indictment and conviction in the 1968 bribery case were improperly admitted into

evidence at his 1972 trial for the purpose of impeaching his credibility (Pet. 11-15). This contention is without merit. The subject of petitioner's conviction in the prior case was first mentioned by petitioner's counsel during his cross-examination of ex-Governor Barron, during which the following exchange occurred (Tr. 201):

> Q. And then it is your testimony, is it not, sir, that money was passed and you were acquitted, correct?
>
> A. Yes, sir.
>
> Q. And Mr. Brown was found guilty on the one count in the indictment, was he not?
>
> A. That is true.

At the beginning of the trial the government told the judge that it wanted to offer the 1968 indictment and conviction of petitioner into evidence as proof of a prior similar act (Tr. 4-15). The judge, however, refused to admit them into evidence at that time. The judge had not finally ruled on the admissibility of the 1968 indictment and conviction when petitioner's counsel introduced the subject of the conviction. Thereafter the government was allowed to read portions of the 1968 indictment to the jury (Tr. 447-448).

Even if petitioner had not introduced the subject himself, it was proper to impeach his credibility through use of the past conviction and indictment, the latter being the best evidence of the exact offense for which petitioner had been convicted. Once petitioner took the stand, the admission of this evidence was proper, *e.g.*, *United States* v. *Escobedo*, 430 F. 2d 14, 18-19 (C.A. 7), certiorari denied, 402 U.S. 951, and any error in its earlier admission would have been harmless. Petitioner's claim of error gains no support from the cited District of Columbia cases, ac-

knowledged by petitioner to depart from the weight of authority (Pet. 14) and involving a statute peculiar to that jurisdiction. See *Fenwick* v. *United States*, 252 F. 2d 124, 126, n. 3 (C.A.D.C.) (2-to-1), and *Campbell* v. *United States*, 176 F. 2d 45, 47-48 (C.A.D.C.). In both cases the defendant's conviction was on appeal and had never been affirmed. Here petitioner's conviction had already been appealed and affirmed, *United States* v. *Sawyers, supra*, and was being attacked only in the district court on a second set of post-trial motions.[5]

2. Petitioner contends that the 1968 indictment and conviction were improperly admitted as evidence of a prior similar act (Pet. 9-11). After petitioner's counsel had cross-examined ex-Governor Barron with respect to his 1968 acquittal and petitioner's conviction for taking a bribe (Tr. 201), the trial judge ruled that he would allow in evidence of the prior crime, as the government had requested, for "the purpose of showing knowledge, intent, and motive" (Tr. 295-296). At that time the government submitted an instruction to the judge on the subject of the effect of a similar act (Tr. 301). It is well established that evidence of prior similar acts is properly admissible to demonstrate, *inter alia*, scheme, design, or intent, *United States* v. *Pauldino*, 443 F. 2d 1108, 1113 (C.A. 10), certiorari denied *sub nom. Bridwell* v. *United States*, 404 U.S. 882.

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[5]Rule 609(e) of the Proposed Rules of Evidence for United States Courts and Magistrates states:

> Pendency of Appeal.—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Although Congress is analyzing the proposed rules before permitting them to go into effect, Rule 609(e) is retained in its entirety in a draft prepared by the Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives. 119 Cong. Rec. H5457 (daily ed. June 26, 1973)

The indictment was introduced into evidence and read to the jury at the close of the government's case (Tr. 446-448). At that time the judge carefully gave the following limiting instruction to the jury:

> I want you to know that that [sic] evidence of that prior conviction cannot be considered by you as substantive evidence that Mr. Brown is guilty of the charge for which he is being tried in this court today, was tried yesterday, and perhaps tomorrow and the next day, whatever we have.
>
> Evidence of a prior conviction may be considered by you on the issue of a defendant's knowledge, intent and motive with regard to the particular offense with which he is now charged in this case, but evidence of an act done at one time is not any evidence or proof whatever that a similar act was done at another time or on some other occasion. Stated otherwise, evidence that this defendant may have been involved in a conspiracy charge touching the crime of bribery in the 1968 trial may not be considered by you in determining whether the defendant, Mr. Brown, committed the crime of conspiring to bribe the juror Buckalew [Tr. 449-450].

Similar cautionary instructions were given by the judge in his final charge to the jury (Tr. 876-878). Once the conviction was put in evidence by petitioner himself, it remained for the trial judge to determine what, if any, limitations were to be placed on the jury's consideration of the evidence. In these circumstances, the use of the 1968 indictment and conviction was proper.

3. Petitioner contends that it was reversible error for the trial court to refuse to admit into evidence the acquittal of Robert Perry on the jury bribery charges (Pet. 15-17). This contention is without substance since Perry's acquittal had nothing to do with petitioner's guilt or inno-

cence (Tr. 18-19, 312-313); see *Burt* v. *United States*, 139 F. 2d 73, 76 (C.A. 5), certiorari denied, 321 U.S. 799.

In *Commonwealth* v. *Quaranta*, 295 Pa. 264, 145 A. 89, 91-92, cited by petitioner (Pet. 16), the defendant attempted to show that two men jointly indicted with him had been tried for the crime and acquitted. The Pennsylvania Supreme Court upheld the refusal of the trial court to admit the acquittals into evidence, stating that such evidence was not admissible on behalf of defendant as evidence tending to establish his innocence.[6]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1973.

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[6] The claim that the government's argument to the jury implied that Perry was "facing prosecution" (Pet. 17) is without support in the record. We note first that Perry had already been acquitted of charges in March 1972. In the closing argument the government stated as follows:

> I hardly expect Mr. Perry would come in here and readily admit to you that he bribed a juror in his capacity as attorney for Governor Barron in the 1968 case. I don't think that's going to be the thing he is going to do.
>
> So I think you can bear in mind—you can take his testimony and weigh it in light of his situation as regards to this entire circumstances [C.A. 64].

Petitioner did not object to these remarks at the time they were made nor seek to have them stricken. Moreover, taken in context, the remarks refer to Perry's status as attorney, and contain no implication that Perry was facing prosecution.